the defendants' application to have the judgment in default set aside.

The application was supported by a number of affidavits. The first of these was that of Muhammad bin Haji Awang, the Managing Director of the defendant company affirmed on January 3, 1984. No explanation was given in this affidavit for the defendants not taking the prescribed steps leading to an appeal against the decision of the Court given on November 10, 1983. For the first time the quantum of the plaintiffs' claim was challenged. The deponent claimed that as the defendants' audited accounts showed that only $89,613.80 was owing to the plaintiffs, there was a triable issue. It is significant that the defendants tried to but failed to get the plaintiffs to confirm that it was only $89,613.80 that was owing. The deponent then went on to specifically challenge 6 items from the itemised detailed statement of the plaintiffs in respect of the defendants in which dates and invoice numbers were given in respect of each item. Those 6 items in aggregate amount to some $3,000.00 and the deponents challenge of them is feeble to say the least: "I am certain that these underlined items are not on account of goods." None of the other 70 odd items in the detailed statement of the plaintiffs was challenged.

The second affidavit was also that of the Managing Director of the defendant company and was affirmed on February 25, 1984. In this affidavit the delay in taking steps to appeal against the decision of November 10, 1983 is explained. The deponent blamed his erstwhile solicitors who had apparently not informed the defendant company of the outcome of the application. He then referred to the execution proceedings commenced by the plaintiffs and stated that at that stage the Managing Director of the plaintiffs was prepared to accept $89,000.00 in full and final settlement but that later the plaintiffs insisted on the full amount and interest.

The final affidavit of the said Managing Director of the defendant company was affirmed on the May 25, 1984 to which was at last exhibited the agreement of June 25, 1980. In his affidavit the deponent talked about information he had obtained in early 1984 including something called a "Data Listing Folder" which apparently "clearly indicates that the plaintiffs' transactions sabotaged the defendants' market". The so-called Data Listing Folder was not shown to the Court and accordingly the Court was deprived of the benefit of the "clear indication". Again the items of the claim of the plaintiffs for goods sold and delivered were not attacked. The thrust of this affidavit again was that the defendants have a counterclaim in excess of the plaintiffs' claim.

That the Managing Director of the defendants was certain in his own mind that those 6 items were not on account for goods cannot provide a defence or even the basis for a defence. In the face of the detailed statement of the plaintiffs which condescended into particulars of dates and numbers of invoices, the bald statement that the audited accounts of the defendants show that a lesser amount was owing to the plaintiffs than that claimed by the plaintiffs cannot be said to provide a defence.

In my judgment the defendant company had not disclosed a *bona fide* reasonable defence. In fact the affidavits filed on behalf of the defendants demonstrate that there is no such defence available to be disclosed. In the event there was no point in allowing the defendants to take the matter further. Without an affidavit of merits the application was bound to fail. The application was dismissed with costs.

Application dismissed.

Solicitors : *Ng Ek Teong & Partners; Shearn Delamore & Co.*

SUCI MATHEWS v. THOMAS MATHEWS

[O.C.J. (Vohrah J.) March 20, 1985]

[Kuala Lumpur – Divorce Petition No. 177 of 1975]

Family law – Divorce – Death of respondent after decree nisi and before decree absolute – Death not known to petitioner – Decree nisi made absolute – Setting aside decree absolute – Divorce and Matrimonial Proceedings Rules 1980, r.53 – Law Reform (Marriage and Divorce) Act, 1976, s.74.

The petitioner obtained a decree *nisi* for dissolution of her marriage to the respondent. Some two years after the decree *nisi* the respondent died but this fact apparently was not known to the then solicitors for the petitioner who applied to the court under rule 53 of the Divorce and Matrimonial Proceedings Rules 1980 for the decree *nisi* to be made absolute, which application was accordingly granted. Subsequently, the petitioner applied to set aside the decree absolute.

Held: as the marriage of the parties was dissolved by death, the petitioner became a widow and the subsequent

making of the decree absolute must be a nullity. Therefore the petitioner was entitled *ex debito justitiae* to have it set aside.

Cases referred to:

(1) *Stanhope* v. *Stanhope* (1886) 11 P.D. 103.
(2) *Re Seaford (deceased)* [1968] 1 All E.R. 482.

DIVORCE PETITION.

G. Vadiveloo for the petitioner/applicant.

Balwant Singh as *amicus curiae.*

C. Abraham holding a watching brief for estate of the respondent.

Vohrah J. : Last week I allowed the petitioner's application in these divorce proceedings to set aside the decree absolute and directed the Senior Assistant Registrar to endorse on the decree *nisi* that the cause had abated. I indicated then that I would give my reasons later and I do so now.

The marriage of the petitioner and the respondent was had and solemnised within the jurisdiction on November 9, 1968. On the basis of a petition for divorce filed by the petitioner the court on April 26, 1982 pronounced a decree *nisi* for the dissolution of the marriage with the consent of the respondent under Section 54 of the Law Reform (Marriage & Divorce) Act 1976. On February 25, 1984 the respondent died but this fact apparently was not known to the then solicitors of the petitioner who on April 12, 1984 applied to the court under Rule 53 of the Divorce and Matrimonial Proceedings Rules 1980 for the decree *nisi* to be made absolute. The decree *nisi* was accordingly made absolute on April 13, 1984.

It is clear that a petition for divorce is a suit for the dissolution of a marriage and affects the status of the parties to the marriage. It is also clear that a decree *nisi* by its very expression is only a provisional order and does not as such determine the marriage. Its effect was made abundantly plain in the Court of Appeal by Cotton L.J. in *Stanhope* v. *Stanhope*[1] said at page 105:-

"What is the position of the parties after a decree nisi? Neither of them can do anything in the suit until the time comes for making the decree absolute, but the suit is not at an end, it is still pending . . .".

What then is the position of a decree absolute that was made after the death of a spouse? The answer, in my view, has been forcefully provided in the same case by Bowen L.J. who said at page 108:-

"A man can no more be divorced after his death than he can after his death be married or sentenced to death. Marriage is a union of husband and wife for their joint lives unless it be dissolved *sooner*, and the Court cannot dissolve a union which has already been determined."

and at page 109:-

"If a decree nisi is made, and the husband dies *before it is made absolute*, he dies while he is still at law a husband, and his wife becomes his widow. . . .".

As the marriage of the parties was dissolved by death on February 25, 1984 the petitioner became a widow on that date and the making of the decree absolute on April 13, 1984 must be a nullity for (to borrow the words of the third judge, Fry L.J., in the same case at page 111) "no power can dissolve a marriage which has been already dissolved by the act of God." This surely is a matter of commonsense which has been very aptly expressed by Russell L.J. in *Re Seaford (deceased)*[2] at page 491 as follows:-

"Whom God had put asunder no man could join together, even for the purpose of putting them asunder again. . . .".

As the decree absolute was a nullity the petitioner was, in my judgment, entitled *ex debito justitiae* to have it set aside and I accordingly exercised my inherent jurisdiction in doing so.

Mr Balwant Singh of the firm of solicitors who previously acted for the deceased respondent was requested by the Court to act as *amicus curiae* and Mr. Cecil Abraham of the firm of solicitors acting on behalf of the estate of the respondent held a watching brief with the consent of Mr. Vadiveloo and I would like hereby to express my appreciation to all three Counsel for their assistance in this matter.

Order accordingly.

Solicitors : *Vadivello & Co.; Jagjit Singh & Co.; Shearn Delamore & Co.*